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Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-401

FRANK GUY MITCHELL, *Petitioner*
v.
THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Frank Guy Mitchell, prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in this case on the 6th day of June, 1973 affirming Petitioner's conviction and denying Petitioner's Application for leave to file Motion for Rehearing.

CITATION TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reprinted in Appendix A hereto, infra p. 11, and is reported in 494 S.W.2d 865.

JURISDICTION

The Texas Court of Criminal Appeals affirmed the State District Court conviction on May 16, 1973. Petitioner's Application for Leave to File Motion for Rehearing was denied June 6, 1973. Jurisdiction of the

Supreme Court is invoked under the authority of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Does the principle of *Burgett v. Texas* apply only to cases in which there is proof of indigency at the time of the prior counseless conviction?

Whether the enhancement of Petitioner's punishment to life imprisonment by the use of a prior conviction, obtained at a time Petitioner was not represented by counsel and did not waive counsel, violated Petitioner's Sixth Amendment right to counsel and Fourteenth Amendment rights to due process and equal protection of the law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in part:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Petitioner was charged with the primary offense of Theft from the Person, ordinarily punishable by a maximum prison term of seven years (Art. 1437 Texas Penal Code). The indictment alleged two prior felony convictions, thus making a life sentence mandatory upon find-

ings of guilt of the primary offense, and that Petitioner had been so convicted.[1]

At a bifurcated trial[2], a jury found Petitioner guilty of the primary offense. At the punishment hearing, Petitioner objected to the introduction of documentary evidence of the first prior conviction, and out of the jury's presence testified that at the time he pled guilty in that case he had no attorney and was not advised of his right to an attorney nor of his right to a jury trial, nor did he waive counsel.[3]

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1. Article 63, Texas Penal Code, The Texas Recidivist Statute, provides:

"Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

2. Pursuant to Article 37.07, Texas Code of Criminal Procedure, the issue of guilt or innocence is first presented to the jury. If the defendant is found guilty, the issue of punishment, including enhancement, is then presented to either the judge or the same jury. In this case the Petitioner chose the jury.

3. The entire transcript of Petitioner's testimony is as follows:

"BY MR. GILLELAND: (Defense counsel)

Q. You are Frank Guy Mitchell?

A. Yes, I am.

Q. Okay. You are the same Frank Guy Mitchell who was convicted in Cause Number 5,823 on the 9th day of April, 1956, in Trinity County, Texas, is that correct?

A. Right.

Q. And, Mr. Mitchell, would you tell the Court whether or not you had the benefit of counsel at the time the conviction was entered against you at that particular proceeding?

A. I did not have counsel.

Q. Okay. Where were you in jail at that time?

A. In Groverton, Texas, the county seat of Trinity County.

Q. If anybody advised you at all, who did?

A. There was a man. He was district high sheriff.

Q. The sheriff of Trinity County?

A. Right.

Q. He carried you over and he told you what to do?

A. He told me to go ahead on and plead guilty to the charges and I would be out in a few months.

(Footnote Continued)

The prosecution offered no evidence to refute Petitioner's sworn testimony, but the Court allowed proof of

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Q. And it's your testimony to this Court that you did not have the benefit and the assistance of counsel at the time you entered your plea of guilty to that charge that we just heretofore referred to?
A. I never talked to but two people. That was the high sheriff and the judge.
Q. And you did enter your plea?
A. Yes, sir.
Q. And you were not advised of your legal rights otherwise?
A. Not the way they do it today, no, sir.
Q. And would you—if you knew you had the right to an attorney, would you have demanded one?
A. My parents was going to get me one. When they knew anything, I was doing my time.
MR. GILLELAND: I will pass the witness.
MR. WOODS: Let me see the record.

CROSS EXAMINATION

BY MR. WOODS: (Prosecutor)

Q. Do you recall the Judge's name?
A. The Judge? I don't know the Judge.
Q. Max Rodgers?
A. I saw it, but I don't know it.
Q. He signed his name Max Rodgers. Would that be the correct name of the judge who administered your sentence?
A. I was just 17 years old then, and that's been a long time. I didn't get to know him personally, just walked up to him. I was in front of him about five or six minutes. I know the high sheriff, because he was a friend of the family and put everybody in jail and all this. Green Evans. I never will forget him.
Q. Did the Judge advise you you had a right to a jury trial?
A. No, sir.
Q. He did not advise you of that?
A. No, sir.
Q. He did not advise you that you did not have to plead guilty?
A. (Shaking head.)
Q. You remember everything but his name, is that correct?
A. Right.
Q. You remember exactly the conversation that transpired?
A. I even remember the day, the day, how the day looked."
(pp. 170-173 Original Record on Appeal)

the prior conviction to go before the jury. The State then introduced a set of documents (commonly called "pen papers") from the Texas Penitentiary concerning Petitioner's first prior conviction containing, among other things, copies of the Judgment and Sentence. The Judgment was a printed form, with blanks partially filled in by typewriter. The part of the Judgment normally used to fill in the Defendant's name and the name of his counsel appears as follows:

> *"This day this cause was called for trial, and the State appeared by her* district *Attorney, and the Defendant* Frank Guy Mitchell *appeared in person, his counsel also being present* _____ * * *."

As indicated, the space provided for defense counsel's name had been left blank.[4]

The jury found that Petitioner had been twice previously convicted as alleged in the indictment and Petitioner was sentenced to life imprisonment.

On appeal to the Texas Court of Criminal Appeals, Petitioner contended that because he did not have counsel at the time of the first conviction, it could not be used to enhance his punishment. The Court of Criminal Appeals held, *inter-alia,* that because "* * * appellant had raised no issue of indigency as of the time of the prior trial" his contention was "without merit", and affirmed both the conviction and the life sentence.

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4. A similar printed judgment form was used in the other prior enhancement convictions (9 concurrent convictions) and in each judgment the name of C. C. Devine, a Houston lawyer, is typed in.

ARGUMENT

TEXAS WRONGFULLY LIMITS THE APPLICATION OF *BURGETT v. TEXAS* TO CASES OF INDIGENCY. PETITIONER WAS DENIED DUE PROCESS WHEN A VOID UNCOUNSELLED CONVICTION WAS USED TO ENHANCE HIS PUNISHMENT TO LIFE IMPRISONMENT.

Burgett v. Texas, 389 U.S. 109, 196 L.Ed.2d 319, 88 S.Ct. 258 (1967) held that a conviction obtained in violation of the right to counsel could not be used to support guilt or to enhance punishment. When *Burgett* was originally presented to the Texas Court of Criminal Appeals (397 S.W.2d 79), no claim was made that he was indigent at the time of his prior counseless conviction, nor was there such claim of indigency made when Burgett was presented to the Supreme Court. Justice Douglas's opinion in *Burgett* does not mention indigency or say that *Burgett* only applies when the defendant was indigent at his counseless conviction. Nonetheless, the Texas Court of Criminal Appeals now limits the application of *Burgett* to cases in which there is a claim of indigency. In *Johnson v. State*, 432 S.W.2d 98, 99 (Tex. Cr. App. 1969) Judge Morrison said:

> "We here observe that for one to secure a favorable holding under *Burgett v. Texas* [supra] it is necessary that a showing of indigency be made."

In *Hudson v. State*, 453 S.W.2d 147, 148 (Tex. Cr. App. 1970) Judge Morrison again said:

> "Appellant went to great length in his effort to establish the absence of counsel in some of the prior convictions, but we have searched the record in vain and fail to find any mention of indigency.

> "*Burgett v. Texas* * * * is based on *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed.2d 799, 83 S.Ct. 792 (1963). *Gideon* is bottomed on the premise of indigency. Without such a showing the question is not before us."

In the instant case the Court of Criminal Appeals said:

> "Further, appellant has raised no question of indigency as of the time of the prior trial. * * * We find appellant's contention to be without merit."

Although *Gideon* was most likely indigent at the time of his conviction, his case stands for a broader proposition, the clear and simple constitutional rule that, in the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer. *Gideon v. Wainwright*, supra; *Loper v. Beto*, 405 U.S. 473, 31 L.Ed.2d 374, 92 S.Ct. 1014 (1972).

In *United States v. Tucker*, 404 U.S. 443, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972), Justice Stewart said:

> "The *Gideon* case established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one' *Burgett v. Texas* * * * . In *Burgett* we said that '(t)o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case.' " 404 U.S. at p. 449

Texas seriously erodes *Gideon*, and *Burgett* when it requires a showing of indigency at the time of the prior conviction. Yet one must strain to imagine a more flagrant

case of denial of counsel than is present here: A seventeen year old black man is held in jail until he is brought before the court by the "high sheriff" of a rural, deep East Texas county and told "to go ahead on and plead guilty to the charges"; he is not advised of his right to a jury trial nor that he did not have to plead guilty; he is before the judge no more than five or six minutes; although his family had planned to obtain an attorney for him, his plea and sentence were rushed through before they were successful:

> "My parents were going to get me one. When they knew anything, I was doing my time."

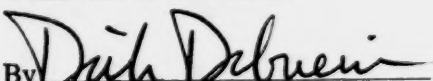
Petitioner "suffered anew" from this deprivation when his punishment was increased from a maximum of seven years to a mandatory life sentence. The Supreme Court should reverse his sentence and remand the case to the Texas Court of Criminal Appeals.

CONCLUSION

For the reasons stated the Supreme Court should reverse the sentence and remand the case to the Texas Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari have been furnished the Office of the Harris County, Texas District Attorney by placing them in the United States Mail, postage prepaid, certified mail with return receipt requested, this 31 day of September, 1973.

Dick DeGuerin

APPENDIX

FRANK GUY MITCHELL, Appellant,
v.
THE STATE OF TEXAS, Appellee.

No. 46041.

Court of Criminal Appeals of Texas.
May 16, 1973.

Rehearing Denied June 6, 1973.

Foreman & DeGuerin, Houston, for appellant.

Carol S. Vance, Dist. Atty., Phyllis Bell and Ronald G. Woods, Asst. Dist. Attys., Houston, Jim D. Vollers, State's Atty., and Robert A. Huttash, Asst. State's Atty., Austin, for the State.

OPINION

ROBERTS, Judge.

The conviction is for the offense of felony theft; punishment was enhanced under Article 63, V.A.P.C., and appellant was assessed life imprisonment.

Two grounds of error are alleged. Appellant first contends that a prior felony conviction used for enhancement purposes was obtained when appellant was not represented by counsel. Appellant concludes, therefore, that reversible error was committed.

[1] Appellant testified that he was not advised of his right to an attorney at this prior trial. Yet the judgment in that cause recites that "Frank Guy Mitchell appeared in person, his counsel also being present . . . ." Further,

appellant has raised no issue of indigency as of the time of the prior trial. See Lott v. State, 480 S.W.2d 743 (Tex. Cr. App. 1972); Hudson v. State, 453 S.W.2d 147 (Tex. Cr. App. 1970). We find appellant's contention to be without merit.

In his final ground, appellant brings forth the argument that the trial court erred in overruling his motion for new trial, there being newly discovered evidence of his innocence. At the hearing on the motion, witnesses placed appellant in Trinity, Texas, on the day of the offense, at approximately 9:30 to 10:00 a.m., between 1:30 and 2:00 p.m., and about 4:00 p.m., the same day. Another witness testified that she lived in the apartment house where the robbery took place and saw the victim enter and exit the apartment where the offense occurred, but did not see appellant.

The State's evidence showed the robbery to have taken place around 11:30 a.m., in Houston. Unrefuted evidence was presented at the hearing that Trinity, Texas, is located some 50 miles from Houston. We can take judicial knowledge of the fact that this figure is an under-estimate. Nevertheless, the appellant has failed to negate the State's theory of guilt.

Also, none of the four witnesses who testified at the hearing on the motion for new trial were subpoenaed for the actual trial. Two of the witnesses' testimony indicated that, though they observed appellant on the day of the offense, he did not know they saw him. Thus, appellant alleges that he could not have known of their availability to him as witnesses. Without reaching the merits as to whether, using due diligence, appellant could have dis-

covered these two witnesses prior to trial,[1] we note that appellant does not even advance a claim that he did not know about the remaining two witnesses, nor that he could not have subpoenaed them for the trial. In fact, the testimony of the witness who placed appellant in Trinity between 9:30 and 10:00 indicates that she was in appellant's presence for approximately twenty minutes.

[2] Appellant has failed to demonstrate that the "new" evidence was not known to him at the time of trial; even if we accept the allegation in appellant's brief that it was unknown to him, he has not shown that such a failure to know of the evidence was not due to a want of diligence on his part. Huffman v. State, 479 S.W.2d (Tex. Cr. App. 1972).

The judgment is affirmed.

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1. The record reflects that this cause was reset five times prior to the date of trial.